

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

Original + Affidavit of Mailing

77-1240

To be argued by
LEE A. ADLERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1240

UNITED STATES OF AMERICA,

—against—

PRAVIT PIYACHINAVAN,

Appellee,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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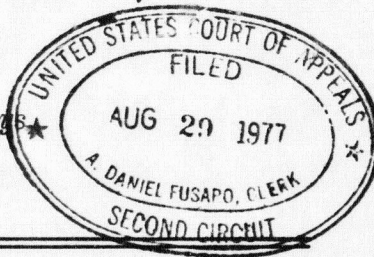




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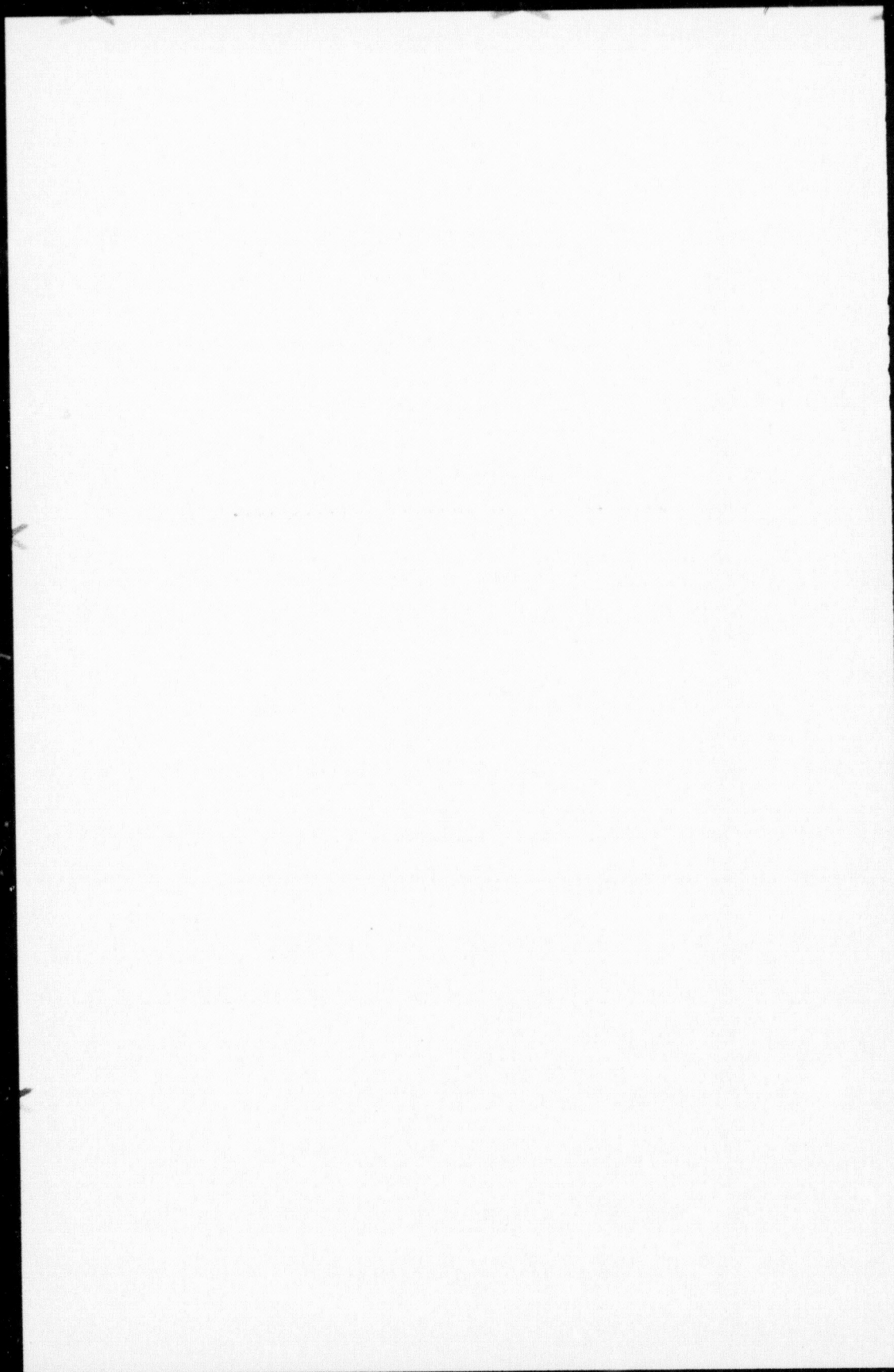
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United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

—against—

PRAVIT PIYACHINAVAN,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Pravit Piyachinavan appeals from a judgment entered May 13, 1977, after a jury trial, in the United States District Court for the Eastern District of New York (Bramwell, J.), which judgment convicted him of unlawful attempted possession of heroin with intent to distribute the same, in violation of 21 U.S.C. §§ 841 and 846. Appellant was sentenced to a term of two years imprisonment with a special parole term of 8 years. Appellant is presently enlarged on bail pending the outcome of this appeal.¹

¹ The indictment also charged appellant with importation of heroin, in violation of 21 U.S.C. § 952(a), and with conspiracy to possess heroin with the intent to distribute, in violation of 21 U.S.C. § 846. The importation count was dismissed prior to trial on motion of the Government. At the close of the Government's case, the court granted the defense's motion under Rule 29 of the Federal Rules of Criminal Procedure for a judgment of acquittal on the conspiracy charge.

On this appeal, appellant claims that the district court erred in the following respects: 1) by denying appellant's motion to suppress the heroin introduced in evidence against him; 2) by erroneously charging the jury on the element of wilfulness; and 3) by erroneously charging the jury on an aiding and abetting theory.

Statement of Facts

A. The Government's Case

The evidence disclosed that on August 25, 1976, a United States Customs Service dog handler stationed at John F. Kennedy International Airport discovered heroin secreted within a photo album enclosed in a package which had arrived that day by airmail from Thailand (3/22/77, 27-28).² The heroin, approximately 5 ounces of the pure white variety and worth approximately \$2,500 an ounce upon its importation, was contained in two clear plastic envelopes which were sealed inside the covers of the photo album (3/22/77, 95-96, 101). The outer cover of the package gave as the name of the sender a "Mr. M. Visuthi", as well as a Thai address. The addressee was "Mr. K. Shensooya, c/o 25-42 23rd Street, Astoria, New York." In addition, the words "Birthday Present" were written at the top of the package cover (3/22/77, Government Exhibits 1A, 29).

The Customs Officer immediately telephoned Agent Kenneth Keefe of the Drug Enforcement Administration ("DEA"). Agent Keefe arranged for the package to be secured at DEA headquarters in Manhattan. Later, in preparation for a "controlled delivery" of some of the heroin, Keefe substituted lactose for the heroin within

² References are to the transcripts of the proceedings on the indicated dates. References preceded by the letter "A" are to pages of appellant's appendix.

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Facts

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the clear plastic envelopes, except for a small quantity
of the heroin which was left in the envelopes. He then
resealed the photo album with the lactose and small
quantity of the original heroin inside and reclosed the
entire package so that it would appear to be, as nearly
as possible, in the same condition as when it first arrived
in the mail (3/22/77, 37-43).

The controlled delivery took place on August 31, 1976.
On that day, DEA agents took up surveillance positions
on 23rd Street in Astoria opposite house number 25-42.
A mail carrier, who had been instructed to leave a notice
at the house indicating that a package addressed to K.
Shensooya had arrived at the local post office, began de-
livering mail to the dwellings on the street (3/22/77, 44-
45). At this point, appellant, wearing a jacket and blue
jeans, was observed standing on the porch of the house at
25-42 watching the mail carrier as well as the street in
general. When the carrier came relatively close to the
house, appellant disappeared inside (3/22/77, 50). Ap-
pellant reappeared very quickly after the carrier had de-
livered mail and the package notice to the residence and
was observed accosting the mailman at an adjacent build-
ing. Appellant, who appeared to be holding a small white
mail slip, engaged the carrier in a brief conversation.
Thereafter the mailman was seen pointing in the direc-
tion of the local post office (3/22/77, 44-51, 105-06).

Appellant thereupon proceeded on 23rd Street in the
direction opposite that of the post office. When he ar-
rived at the first corner, appellant again turned in a
direction away from the post office. After proceeding
for about a block and a half, appellant made an abrupt
about face and took the most direct route to the post
office without walking on 23rd Street. Agents noticed
that appellant, during his entire walk, constantly looked
about in all directions (3/22/77, 51-52, 106-107). At
the post office, appellant went immediately to the window
to pick up the package. He then carried the package back
to 25-42 23rd Street (3/22/77, 52-53). The route ap-

pellant took back was also not direct; appellant first proceeded past 23rd Street and stopped in a grocery store for just a few seconds (3/22/77, 52-54, 107-108).

Prior to, and in anticipation of, the mailman's delivery of the package notice and the picking up of the package by appellant, an affidavit for a search warrant for the upstairs floor of 25-42 23rd Street had been prepared. The affidavit outlined the facts to support the information and belief on the part of the agents that heroin was present at the upstairs floor of 25-42 23rd Street: specifically, the customs seizure of a package containing field tested heroin which had come to New York in the mail from Thailand and was addressed to 25-42 23rd Street; investigation by DEA agents disclosing that a citizen of Thailand lived at the upstairs floor of the premises; and the expected observation by the agents of an individual carrying the mail package to the premises. (A. 75-A. 76). The affidavit, with the proper date filled in, was presented to the Magistrate after appellant had entered the premises with the package.

After appellant arrived back at the house, the agents waited for approximately 15 or 20 minutes until a radio message from the Eastern District Courthouse announced the issuance of the search warrant (3/22/77, 55, 108). As stated in the affidavit for the warrant, the agents knew that the house at 25-42 was a two family structure with one family unit on the first floor and the second unit upstairs (A. 75). The agents further knew that the family occupying the downstairs had a Greek name and that the mailbox for the upstairs listed the Thai name "Pamon" (3/22/77, 70). When the agents came to the door of the house, they were let in by a Greek woman who had come out of the downstairs apartment. The agents then went upstairs and announced themselves (3/22/77, 56). After a few seconds, the agents, having identified themselves as federal officers, were admitted into the apartment by appellant (3/22/77,

56-58). Appellant had changed his clothing; he was now wearing a "sarong" and shirt rather than jeans and a jacket³ (3/22/77, 57-58). Agent Keefe then began walking through the apartment to see if other persons might be present. While passing through the living room, he saw the mail package open on the couch. The photo album had been removed from the outer wrapping. Further, one of the covers of the photo album had been torn open, and one of the clear plastic envelopes containing the lactose and heroin was clearly visible to the agent (3/22/77, 58-59).

After no one else was found in the apartment, appellant was arrested. It was established that he was a twenty-seven year old doctoral student at Long Island University who had come to the United States from Thailand in 1970 and that he lived, not at 25-42 23rd Street, but at 46th Street in Woodside, Queens.⁴ (3/22/77, 122).

B. The Defense Case

Appellant called only one witness—Samuel Crocker, the letter carrier who had delivered mail to 25-42 23rd Street on the day of the controlled delivery. Crocker identified the slip that he left at the house announcing that a package for "Shensooya" was waiting at the post office. Crocker recalled an oriental male approaching him after he had delivered mail to the house, but he could not

³ It should be noted that Agent Keefe, while checking the apartment for individuals other than appellant, saw appellant's jacket and jeans in one of the bedrooms (3/22/77, 59).

⁴ In addition, the Government introduced the testimony of an F.B.I. fingerprint expert after the defense attorney questioned Agent Keefe on whether a fingerprint analysis of the package had been made. The expert testified, in essence, that although analysis had failed to disclose appellant's fingerprints on the package recovered from the album, the absence of identifiable fingerprints of appellant on the package did not necessarily mean that appellant had not touched the package (3/23/77, 4-8).

identify appellant as that individual (3/23/77, 21A-25A).

C. The Motion to Suppress

Prior to the commencement of trial, appellant moved for suppression of the heroin and package which were taken from 25-42 23rd Street at the time of his arrest. Appellant contended that the search warrant which was obtained immediately prior to the entry by the agents onto the premises was not issued upon the basis of an affidavit containing enough information to identify the particular family unit of the two family house to be searched. Appellant asserted that the affidavit for the warrant was insufficient to support the search of the upstairs half of the premises. The trial judge found the affidavit to be sufficient and denied the motion (A. 9-A. 21).

ARGUMENT

POINT I

The search warrant was obtained upon sufficient probable cause; further, the package and its contents were admissible as having been seized incident to appellant's arrest.

On appeal, appellant argues, as he did below, that the affidavit for the search warrant did not specify how the agents knew that the upstairs part of the two family house, rather than the downstairs portion, was the area to be searched. Thus, appellant reasons, the affidavit lacks an explanation of the "underlying circumstances" forming the agent's belief that the upstairs part of the house was the area to be searched, thus rendering the warrant defective, citing *Spinelli v. United States*, 393

U.S. 410 (1969), and *United States v. Karathanos*, 531 F.2d 26 (2d Cir. 1976).⁵

The affidavit said, in relevant part, that the package containing the heroin had been mailed from Bangkok, Thailand. It also stated that a man was seen carrying the package from the post office into the residence and that "investigation" by the agents disclosed that a Thai national lived in the upstairs part of the house. (A. 75-A. 76). We submit that this constituted information on the basis of which the United States Magistrate could properly issue a warrant for the upstairs apartment. Unlike *Spinelli, supra*, this was not a situation where an informant was providing the essential information concerning the commission of a crime. Here, government agents themselves witnessed, on a first-hand basis, the illegal importation of heroin and appellant's involvement in the scheme. Under these circumstances, the affidavit was clearly sufficient. The agents *did* reveal the basis for their belief that the narcotics were on the second floor of the building. That basis was, as stated in the affidavit, their "investigation," which revealed that a Thai national lived on that floor. Under the circumstances of this case, it would be ludicrous to argue, as appellant does, that the affidavit had to specify what physical steps the agents took in their investigation to determine that a citizen of Thailand lived upstairs. This Court has disavowed the application of overly technical requirements with respect

⁵ The search warrant and its supporting affidavit have been reproduced for this Court in appellant's appendix, pp. 74-76. The portion of the affidavit on which appellant's argument centers is paragraph 2 of the affidavit, which stated, in support of the belief that the second floor of 25-42 was the part of the building to which appellant had repaired with the narcotics: "Investigation by the Drug Enforcement Administration has disclosed that a citizen of Thailand resides at the upstairs floor of the above described premises." The affidavit also recited that the package containing the heroin had been mailed from Thailand to one K. Shensooya.

to the execution of warrants in a two family structure. See, *United States v. Santore*, 290 F.2d 51, 66-67 (2d Cir. 1959), *cert. denied*, 365 U.S. 834 (1961); *United States v. Campanile*, 516 F.2d 288, 291 (2d Cir. 1975). Acceptance of appellant's view in the circumstances of this case would defeat the strong public policy of granting deference to determinations of probable cause made by a neutral and detached magistrate. *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *United States v. Sultan*, 463 F.2d 1066, 1068 (2d Cir. 1972); *United States v. Gomez-Londono*, 553 F.2d 805, 810 (2d Cir. 1977).

We note further that under *United States v. Santore*, *supra*, warrants that fail to specify the particular unit of a two family house to be searched are deemed to be valid where agents reasonably believe the house to be a one family house. In view of the *Santore* holding, there would be created, we believe, an anomaly in the law if this Court were to hold a warrant invalid where agents took the care to ascertain the two family nature of a house and to specify accurately the premises in the warrant. See also *United States v. Ramos*, 282 F. Supp. 354 (S.D. N.Y. 1968).

We submit, moreover, that irrespective of the warrant's validity, the album and heroin accompanying it were properly admitted into evidence as materials seized incident to a lawful arrest.⁶ The uncontradicted evidence

⁶ Appellant suggests in his brief that the Government, having advanced no theory in the district court to justify the seizure other than the search warrant, may not raise alternate grounds on this appeal. (Appellant's brief at p. 18). Such a proposition is clearly erroneous. The law places upon the party seeking to suppress evidence the burden of raising particular grounds in opposition to the admission of the evidence. There is no concomitant obligation upon the party seeking to introduce the evidence. See, *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 424 U.S. 918 (1976); *United States v. Galante*, 547 F.2d 733 (2d Cir. 1976).

in this case was that the agents saw appellant enter 25-42 23rd Street with the mail package and join. They were let into the house by a "Greek" woman from the downstairs apartment and knew that the upstairs was listed under a Thai name. The agents duly announced themselves to appellant before entering the upstairs apartment and were let into the apartment by appellant. The entry into the upstairs apartment was thus made pursuant to the authority of the agents to make warrantless daytime arrests, 21 U.S.C. § 878; *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Fernandez*, 480 F.2d 726, 740 n.20 (2d Cir. 1973); *United States v. Hall*, 348 F.2d 837, 841-42 (2d Cir. 1965); *United States v. DiStefano*, 555 F.2d 1094, 1100 n.8 (2d Cir. 1977); *United States v. Morell*, 524 F.2d 550 (2d Cir. 1975), and was executed with the proper warning procedures. See, *Sabbath v. United States*, 391 U.S. 585 (1967).⁷

We submit that, under these circumstances, the seizure of the album and contents was also made pursuant to the "plain view" doctrine. *Harris v. United States*, 390 U.S. 234 (1968); *Ker v. California*, 374 U.S. 23, 42-43 (1963). Agent Keefe testified that he walked through the apartment in which appellant was arrested in order to check for the presence of other individuals. While he was traversing the apartment, the package and its contents were clearly visible to Keefe on the living room couch. There can be no doubt of Agent Keefe's authority to

⁷ *United States v. Jarvis*, — F.2d —, Slip op. 4921 (2d Cir. July 26, 1977), on which a petition for rehearing before this Court is now pending, does not require a contrary conclusion. In *Jarvis*, unlike the instant case, there was an absence of the exigent circumstances of a continuing crime involving dangerous drugs. In addition, the entry in *Jarvis*, unlike the one here, was made forcibly. These distinctions from *Jarvis*, we submit, place the instant case within the holding of *United States v. Price*, 345 F.2d 256, 259 (2d Cir. 1965), wherein a warrantless day time search was upheld.

check the apartment for the presence of other individuals for reasons of security. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *United States v. Montiel*, 526 F.2d 1008, 1010 (2d Cir. 1975); *United States v. DiStefano*, *supra* at 1101; *United States v. Morell*, *supra*. Thus, after having lawfully viewed the heroin, the agents rightfully seized it.

POINT II

The court's charge on the element of wilfulness was proper.

Appellant assigns as error a portion of the Court's instructions to the jury dealing with wilfulness as an element of the offense. The trial judge, in his charge to the jury, dealt with the question of wilfulness and intent in three sequences of the charge:

An act or omission is willfully done if done voluntarily and intentionally with the specific intent to do something which the law forbids or with the specific intent to fail to do something the law requires to be done. That is to say, with bad purpose either to disobey or disregard the law.

You, of course, may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or per-

sons and that the defendant participated in its commission.

Willfully to cause criminal acts defined:

In order to cause another person to commit a criminal act, it is necessary that the accused willfully did or willfully failed to do something which by reason of the ordinary course of nature or the ordinary habits of life results in the other person's either doing something the law forbids or failing to do something the law requires to be done.

An act of failure to act is willfully done if done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done. That is to say, with bad purpose to either disobey or to disregard the law.

Mere presence is not sufficient. Mere presence at a scene of a crime and knowledge that a crime is being committed are not sufficient to establish that the defendant aided and abetted the crime, unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

* * *

The crime charged in this case is a serious crime which requires proof of specific intent before a defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act.

To establish specific intent, the Government must prove that a defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent ordinarily may not be proved directly because there is no way of fathoming or scrutinizing the operations of the human mind, but you may infer the defendant's intent from the surrounding circumstances.

You may consider any statement made, an act done or omitted by the defendant and all other facts and circumstances in evidence which indicate his state of mind.

* * *

Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question. Direct proof is unnecessary.

Knowledge and intent may be inferred from all the surrounding circumstances. The fact of knowledge may be established by direct or indirect or circumstantial evidence, just as any other fact in the case.

One may not willfully or intentionally remain ignorant of a fact important and material to his conduct and thereby escape punishment. The defense of lack of knowledge is not available to the defendant if the jury finds from all the evidence, beyond a reasonable doubt, that the defendant has a conscious purpose to avoid enlightenment by closing his eyes to the fact which should have caused him to investigate.

It is obvious that the critical question in this case is whether the defendant, Mr. Piyachinavan,

had narcotics. You may not find the defendant guilty unless you find beyond a reasonable doubt that he knew the package was to contain narcotics.

In other words, that the defendant Piyachinavan knew that the package he picked up from the Post Office was supposed to contain narcotics. The fact of knowledge may be established by direct or circumstantial evidence, just as any other fact in the case. Knowledge may be proven by the defendant's conduct since we have no way of looking into a person's mind, directly.

Now, in this context, bear in mind that one may not willfully and intentionally remain ignorant of a fact important and material to his conduct in order to escape the consequences of the criminal law. You may find a defendant acted knowingly if you find that either he actually knew he had narcotics or that he deliberately closed his eyes to what he had every reason to believe was the fact.

I should like to emphasize, ladies and gentlemen, that the requisite knowledge cannot be established by demonstrating mere negligence or even foolishness on the part of the defendant (A. 18-19, A. 21, A. 30-32).

Appellant attacks the charge in two respects. He contends first that the evidence failed to establish that there was a "high probability" that appellant knew what was in the package. Absent such a quantum of proof, it is argued, it was improper for the court to give a conscious avoidance charge, since such a charge might have implied "that something less than knowledge of what was in the package would suffice in order to return a verdict of guilty". (Brief, at page 21). Appellant also claims that the court incorrectly failed to charge that if appellant believed that the package contained "innocent" items, he

would be entitled to a verdict of acquittal, citing *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975); *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (*en banc*). A review of the record discloses that these arguments have no merit.

It should be noted at the outset that appellant's argument that the evidence failed to disclose a "high probability" that he knew the package contained heroin is nothing other than an attack upon all the evidence of the case. Appellant does not in this appeal, nor could he, challenge the verdict as lacking sufficient evidence to support it. The evidence showing knowledge on appellant's part was overwhelming: his waiting for the package and disappearing when the mailman arrived; his speedy accosting of the mailman on the street; his roundabout route to and from the post office and his gazing about; and, most important, his opening of a package addressed to someone other than himself and his ripping open of the album cover to get at the drugs. Appellant therefore cannot attack the charge of the court as lacking a proper evidentiary basis.

In addition, it was not necessary for the judge to use the phrase "high probability" in connection with appellant's knowledge of his possession of contraband, or to explicitly instruct the jury that it had to acquit if it found that appellant actually believed that the package did not contain heroin. The short answer is that the conscious avoidance charge given here has specifically been approved by this Court. *United States v. Joly*, 493 F.2d 672, 674-675 (2d Cir. 1974). Moreover, Judge Bramwell twice told the jury that knowing and intentional possession of the narcotic drugs was an essential element of the crime charged (A. 18, A. 20). The court

further emphasized, as seen in the last paragraph of the quoted portion above, that the element of knowledge could not be established through "mere presence", "mere negligence", or "foolishness."

Finally, we submit that appellant's trial counsel failed to make a proper objection with respect to appellant's second argument challenging the court's charge (the claim that the jury should have been told it had to acquit if it found that appellant actually believed the package contained "innocent" items). A review of the conference between the attorneys and the court on the subject of jury instructions fails to reveal a suggestion to the court by appellant's trial counsel that the charge be framed in this particular way. (3/24/77, 3A-20A). Nor did counsel object on this basis at the end of the court's charge (A. 45). Having failed to make a proper objection, appellant has waived the opportunity to raise the issue on appeal. Fed.R. Crim.P. 30; *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir.), *cert. denied*, 425 U.S. 970 (1975).⁸

⁸ Appellant's reliance on *United States v. Bright*, *supra*, and *United States v. Jewell*, *supra*, is misplaced. In *Bright*, a conviction for unlawful possession of stolen mail was reversed after the trial judge, unlike here, instructed the jury that it could find knowledge on the part of the defendant of the stolen character of the mail if it found that the defendant acted with "reckless disregard . . ." or . . . conscious effort to avoid learning the truth . . .; and the court failed to explain to the jury the meaning of the term "reckless disregard" or to balance these instructions by telling the jury that it had to acquit if it found the defendant actually believed the mail was not stolen. In *Jewell*, *supra*, the Ninth Circuit upheld instructions which were less favorable to the defendant than those given here which omitted any cautionary reference to negligence, foolishness or mistake, 532 F.2d at 700.

POINT III

The Court properly charged the jury on an aiding and abetting theory.

Appellant argues that there was no evidence to justify the trial court in charging the jury on an aiding and abetting theory. 18 U.S.C. § 2. He then goes on to contend that where a court submits a case to a jury on a theory having no support in the record, a subsequent guilty verdict is fatally defective. *Yates v. United States*, 354 U.S. 298 (1957); *United States v. Adcock*, 447 F.2d 1337 (2d Cir.), cert. denied, 404 U.S. 439 (1971); *United States v. Rodriguez*, 465 F.2d 5 (2d Cir. 1972). This argument is without merit.

The Court charged the jury in pertinent part as follows:

In a cause where two persons are charged with the commission of a crime such as Count 1 here, where Pravit Piyachinavan is charged with Tera Pamon, the guilt of the defendant may be established without proof that he personally did every act constituting the offense charged.

Count 1 of the indictment includes Title 18 of the United States Code Section 2 which states:

Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal. Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal.

In other words, every person who willfully participates in the commission of a crime may be found to be guilty of that offense or participation is willful if done voluntarily and intentionally

and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done. That is to say, with bad purpose either to disobey or to disregard the law.

Aid and abet defined:

In order to aid and abet another to commit a crime, it is necessary that the accused willfully associate himself in some way with the criminal venture and willfully participate in it as he would in something he wished to bring about. That is to say, that he willfully seek by some act or omission of his to make the criminal venture succeed (A. 17-A. 18).

We submit that there clearly was sufficient evidence to support submitting the case to the jury on an aiding and abetting theory. The jury had as evidence the package sent from Thailand to the United States by airmail. The package had on it a return address in Thailand and a name at such address which was entirely different from appellant's name and address. The package was addressed to an individual bearing still another name, K. Shensooya. The evidence established further that appellant was a student in the United States and had been living in this country since 1970. Under such circumstances, the jury would have been entirely justified in concluding that there was at least one person other than appellant involved with the heroin in this case.⁹ And the Circuits have uniformly held that in order to establish criminal culpability under 18 U.S.C. § 2 it is unnecessary that the "identity of the

⁹ Indeed, the international distribution of pure quality heroin is recognized as being other than a one man operation. See, *United States v. One 1974 Cadillac Eldorado Sedan, Etc.*, 548 F.2d 421, 426 (2d Cir. 1977): "The nabobs of the drug business normally eschew physical custody of the dope, relegating to their minions possession of the brown paper bag...."

principal be established, much less that he be convicted." *Feldstein v. United States*, 429 F.2d 1092 (9th Cir. 1970), *cert. denied*, 400 U.S. 920 (1971), *reh. denied*, 400 U.S. 1002; *United States v. Austin*, 462 F.2d 724 (10th Cir. 1972); *United States v. Provenzano*, 334 F.2d 678 (3d Cir. 1964); *Hendrix v. United States*, 237 F.2d 971, 975 (5th Cir. 1964).

Moreover, the Court's charge on aiding and abetting did not alter the central issue for the jury's determination. Whether on the theory of appellant as principal or appellant as aider and abettor, the jury was told it could not find appellant guilty unless it believed beyond a reasonable doubt that appellant knew the package he picked up was to contain heroin. In *Yates v. United States*, *supra*, upon which appellant principally relies, the Court recognized that an improper charge, which we do not concede there was here, constituted harmless error if such a charge does not remove, from the jury proper consideration of the essential elements of the crime. 354 U.S. at 311-312.¹⁰ Accordingly, appellant's argument should be rejected.

¹⁰ The Court in *Yates*, *supra*, found that case to be an improper one in which to apply the harmless error doctrine since the charge could have been construed to change the theory of the case in a fundamental way and, in effect, operated to conform the law to the prosecution's evidence.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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DOLORES M. BYRD

being duly sworn,

and says that he is employed in the office of the United States Attorney for the Eastern
of New York.

on the 29th day of August 19 77 he served a copy of the within

BRIEF FOR APPELLEE

ing the same in a properly postpaid franked envelope addressed to:
ilbert Epstein, Esq., 100 Church Street, Suite 1800, New York,
ew York 10007

ponent further says that he sealed the said envelope and placed the same in the mail chute
r mailing in the United States Court House, ^{225 Cadman Plaza East} ~~Washington Street~~, Borough of Brooklyn, County
s, City of New York.

to before me this

day of August 19 77

BARBARA A. ALLEN
Public, State of New York
No. 24-4646824
Qualified in Kings County
Commission Expires March 30, 1979

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